IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 19, 2006

STATE OF TENNESSEE v. JENNIFER SILISKI

Appeal from the Circuit Court for Williamson County
No. II-CR03192 R.E. Lee Davies, Judge

No. M2004-02361-CCA-R3-CD - Filed September 27, 2006

The defendant, Jennifer Siliski, is charged with possession of ketamine hydrochloride, a Schedule III controlled substance. The trial judge suppressed evidence of the ketamine hydrochloride, ruling that its seizure exceeded the scope of the search warrant. The state appeals, arguing that the evidence was seized pursuant to the defendant's consent. We conclude that the trial court properly suppressed the evidence, and we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN, J., and J.S. DANIEL, SR. J., joined.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Ronald L. Davis, District Attorney General; Braden H. Boucek, Assistant District Attorney General, for the appellant, State of Tennessee.

John E. Herbison, Nashville, Tennessee (on appeal), and Rebecca E. Byrd, Franklin, Tennessee (at trial), for the appellee, Jennifer Siliski.

OPINION

This case arose from the defendant's operation of a Maltese dog breeding business in her home. A Williamson County grand jury indicted the defendant on thirty counts of cruelty to animals under Tennessee Code Annotated section 39-14-202 and one count of possession of a Schedule III controlled substance, ketamine hydrochloride, under Tennessee Code Annotated section 39-17-413. The trial court severed the possession count from the animal cruelty counts. The defendant was convicted of nine counts of cruelty to animals. The trial court ruled that the seizure of the ketamine hydrochloride exceeded the scope of the warrant to search the defendant's home and suppressed it as evidence.

On January 22, 2004, authorities from the District Attorney's office, the Williamson County Sheriff's Department, Williamson County Animal Control, and the Occupational Safety and Health Administration conducted a search of the defendant's home pursuant to a search warrant. The warrant stated that probable cause existed to believe that the defendant had the following property in her residence: "Between one hundred sixty (160) and two (200) hundred dogs in a state of inhumane conditions constituting the offense of Cruelty to Animals T.C.A. 39-14-202." In addition to 210 dogs and twenty-one cats, authorities discovered and seized other evidence, including medical supplies and a bottle of ketamine hydrochloride, a drug commonly used as a veterinary anaesthetic. Doctor Mary Fooshee, a consulting veterinarian with the Williamson County Animal Control, found the ketamine hydrochloride in a drawer in the defendant's kitchen.

At a pretrial hearing on the defendant's motion to suppress, the defendant's ex-husband, Alan Siliski, testified that he came to the defendant's home at around 11:00 p.m. on the night of January 22, 2004. The defendant had asked Mr. Siliski, a licensed attorney, to act as her attorney while her home was being searched. Mr. Siliski stated that the search was already underway by the time he arrived at the house and that he was told he could not act as the defendant's attorney because the defendant had not yet been charged with any crime. He said he was permitted to enter the house but was ordered to stay in the sunroom with the defendant and her four children. He stated that he stayed there until about 5:00 a.m., when the search concluded, and that he was not permitted to leave the room during that time. He said he saw officers opening drawers and cabinets in the kitchen, which was visible from the sunroom. He stated that the majority of the dogs in the house were located in two rooms at the end of the house, a large bonus room and a converted garage. He said there were a few dogs in the kitchen and a mother and puppies in a play pen in the defendant's upstairs bedroom.

On cross-examination, Mr. Siliski admitted that it was possible that the defendant gave consent to search before he arrived at the house. He stated that he never heard the defendant tell authorities that they could not search a particular place in the house. He said he did not see where the ketamine hydrochloride was found.

The defendant testified that she was at home with her four children and her disabled child's nurse on January 22, 2004, when the authorities arrived with the search warrant around 5:30 p.m. She said the family was told to stay in the sunroom. She said she called Mr. Siliski to represent her. She described the layout of the house and stated that the majority of the mother and baby dogs were in the "upper kennel" on the first floor and that most of the rest of the dogs were in a converted garage room. She said there was one mother dog with three new puppies in her bedroom. She said she could see into the kitchen from the sunroom. She stated that she primarily kept medications for the dogs in the kitchen drawers and that the kitchen drawers were not open when the search commenced. She said she saw Dr. Fooshee and others opening drawers in the kitchen. The defendant testified that she did not give consent to search her home or consent to search for medications. She said that after she was presented with a search warrant, she did not resist the search.

On cross-examination, the defendant testified that she told officers that she would be cooperative and would not "give them any trouble." She said she did not recall telling them that she had "nothing to hide," and she denied telling Investigator John Brown with the District Attorney General's office that he could "go anywhere and take whatever [he] need[ed]." She said she did not see from where the ketamine hydrochloride was taken. She said the only medical supplies that were in plain view were syringes, intravenous bags, and eye cream.

Investigator Brown testified that he became involved in the investigation when he met with Animal Control about two weeks before the date of the search. He said Animal Control had received complaints about possible animal cruelty in the defendant's home. He said that on the morning of January 22, he and Deborah Leddy with Animal Control, went to the defendant's house, hoping to speak with the defendant. They received no answer from the defendant. Later that day, Investigator Brown received a telephone call from Karen Burnham, who said that she had worked for the defendant and described the conditions in the defendant's home. Based on the information he received from Ms. Burnham and his own observations upon going to the defendant's house, Investigator Brown secured a search warrant and executed it later that day.

Investigator Brown testified that when he first arrived at the defendant's residence he spoke with the defendant, who asked if he had a search warrant. He explained that he did and instructed her to sit with the rest of the family in the sunroom. He said the defendant "just talked and talked and talked and just wouldn't even stop talking." He said she told him, "I have nothing to hide, you can search where you want to search, I have nothing to hide, I have done nothing wrong." He stated that he asked the defendant to go to the sunroom but that she was never confined anywhere. He described the defendant's conduct as "forthcoming and cooperative." He said she never asked for an attorney, even when he asked for a statement from her later that night. He said Mr. Siliski did not speak to him or other officers at all while they were conducting the search. He said one of the deputies found the ketamine hydrochloride, but he did not know where it was found.

Investigator Brown testified that he understood that the defendant had given him and the other officials consent to search the entire house and that she never rescinded that consent. He said she never told anyone not to go through drawers or cabinets. He said that at one point, the defendant voluntarily gave him records and documents. He said he saw medical supplies lying around the house in plain view, from which he gathered that she had been medically treating the animals. He testified that if the defendant had not consented to a broad search, no one would have ever opened drawers.

Because Dr. Fooshee was not present at the suppression hearing to testify as to where she found the ketamine hydrochloride, the trial court reserved its ruling on the motion to suppress as it related to the ketamine hydrochloride and other items allegedly found in drawers. The court did, however, find that "Detective Brown was credible in his testimony and not Ms. Siliski, in terms of how this search took place." At a jury-out hearing during the animal cruelty trial, Dr. Fooshee testified that she searched drawers in the defendant's house, looking for medical supplies. She said she found a controlled substance in one of the drawers. She said that Investigator Brown and one

of the deputies told her, after checking with the assistant district attorney, that it was permissible to search the drawers. She said that she was looking through the drawers for a long time, that she was visible to the defendant during this time, and that the defendant never told her to stop searching the drawers. After Dr. Fooshee's testimony, the trial court ruled that the ketamine hydrochloride and other items found in drawers would be suppressed because their seizure exceeded the scope of the search warrant.

The state appeals that ruling of the trial court. The state argues that the defendant consented to a search that exceeded the scope of the search warrant and that she never rescinded her consent. It notes that the trial court accredited the testimony of Investigator Brown, who stated that the defendant told him he could search anywhere and take anything. The defendant has not filed a brief. In her motion to suppress, the defendant argued that the search warrant only gave authority to search for animals and other items in plain view and that searching through drawers exceeded the scope of the search warrant.

We first note that a trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The application of the law to the facts as determined by the trial court is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "article 1, section 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment." State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Sneed v. State, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968)). The Fourth Amendment requires that a search of a home be conducted only pursuant to a valid search warrant, unless an exception to the warrant requirement applies. Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980). It is well established that a search is valid even if not authorized by a search warrant if there is a valid consent to search. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973). "To pass constitutional muster, consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). The validity of consent is determined by examining the facts. State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993). The burden is on the state to prove that consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 1791-92 (1968).

The trial court held that the search of drawers in the defendant's house exceeded the scope of the search warrant. The state does not challenge this, but it contends that the defendant consented to the search. Because the trial court accredited the testimony of Investigator Brown, we take as true his account that the defendant told him, "I have nothing to hide, you can search where you want to search, I have nothing to hide, I have done nothing wrong." According to Investigator Brown, the

defendant made this statement after he informed her that he had a search warrant. We conclude that the defendant's statement did not constitute consent to search in excess of what was authorized by the search warrant. Rather, we view the defendant's statement to be "no more than acquiescence to a claim of lawful authority." Id. at 549. In Bumper, the United States Supreme Court held that consent to search is not valid when it is given only after authorities conducting the search assert that they have a search warrant. Id. at 548. The Court rationalized that such a situation involves "coercion–albeit colorably lawful coercion." Id. at 550. Our supreme court interpreted Bumper to mean that the state "must show by clear and convincing evidence that the consent is not based on the warrant and was not coerced by other factors." Earls v. State, 496 S.W.2d 464, 467 (Tenn. 1973).

In the present case, the trial court, though accrediting the testimony of Investigator Brown, ruled that the search of the drawers was unlawful. Although the court did not expressly address the consent issue in its ruling, it found that "no exception to the requirement of a warrant" was shown. We see no reason to upset the ruling of the trial court. Investigator Brown's testimony that the defendant was "forthcoming and cooperative" and stated that the officers could search where they wanted, indicated little more than that the defendant acquiesced to the investigator's claim of lawful authority. Investigator Brown stated that the defendant expressed her willingness to cooperate after she asked whether he had a search warrant and was told that he did. In such a situation, the state must prove by clear and convincing evidence that the defendant consented to more than that which was authorized by the search warrant. The state did not provide such proof. Moreover, the state's evidence did not show that the "consent" was either specific or unequivocal, as is required for a valid consent. Brown, 836 S.W.2d at 547. We believe one can reasonably infer from the defendant's conduct and statements, related by Investigator Brown, that she intended to cooperate with their search, not to authorize a greater search. We conclude that the trial court properly suppressed the ketamine hydrochloride.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE